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CASE NO. [illegible]

IN THE SUPREME COURT OF THE UNITED STATES

U. SHERMAN JONES, PETITIONER,

vs.

WILLIAM M. PATTERSON, DOROTHY A. McFARLAND, NEE PATTERSON, SHIRLEY A. PATTERSON, HOWELL M. PATTERSON, J. ALLEN PATTERSON, AND RUBY E. PATTERSON, MINORS, BY THEIR NEXT FRIEND, WILLIAM M. PATTERSON, RESPONDENTS.

PETITIONER'S REPLY TO ANSWER BRIEF OF RESPONDENTS

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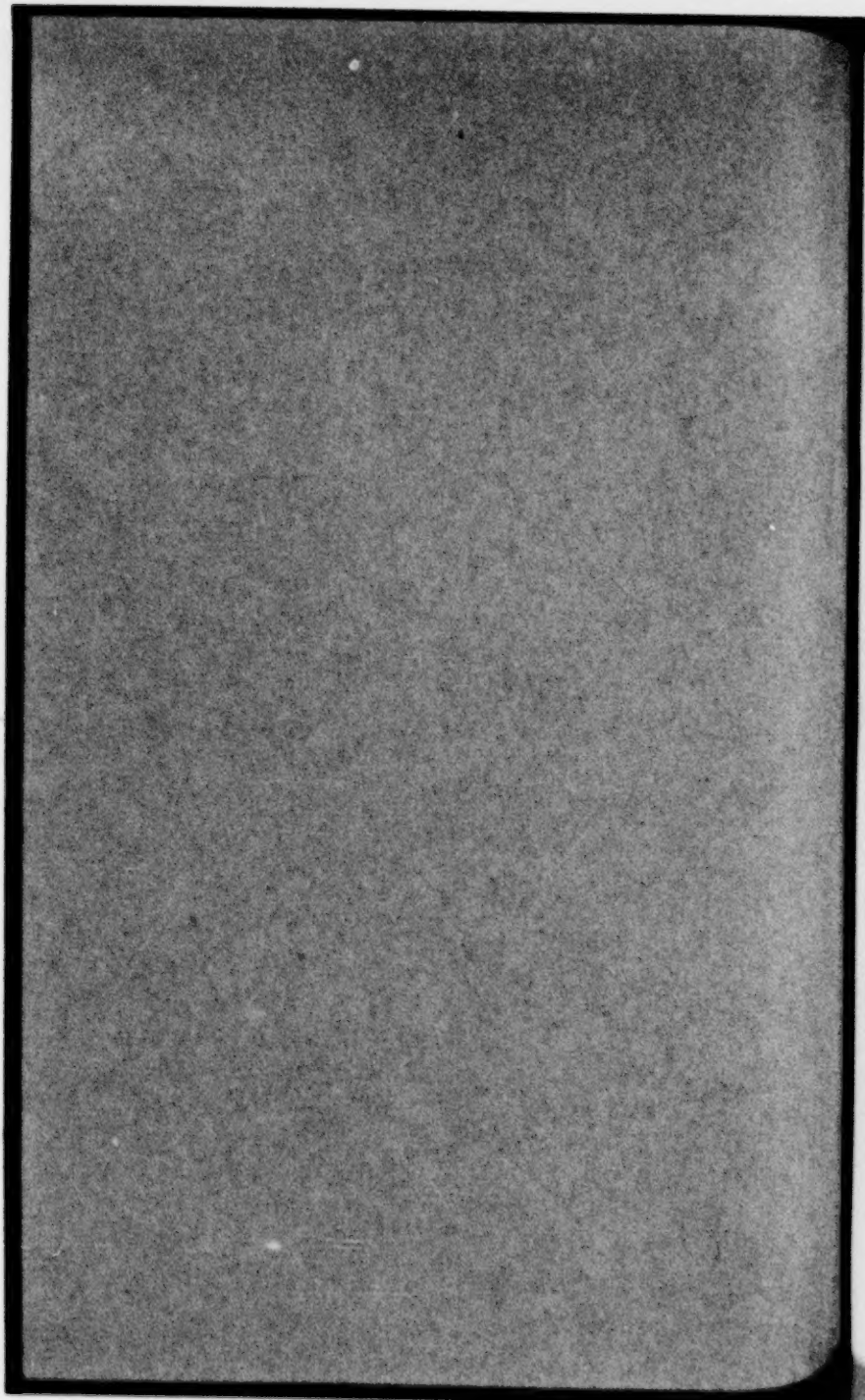

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IN THE SUPREME COURT OF THE UNITED STATES

U. SHERMAN JOINES, PETITIONER,

vs.

WILLIAM M. PATTERSON, DOROTHY A. McFARLAND, NEE PATTERSON, SHELBY A. PATTERSON, HOWELL M. PATTERSON, J. ALLEN PATTERSON, AND RUBY E. PATTERSON, MINORS, BY THEIR NEXT FRIEND, WILLIAM M. PATTERSON, RESPONDENTS.

PETITIONER'S REPLY TO ANSWER BRIEF OF RESPONDENTS

PREFACE

After having read the answer brief filed by respondents in the above styled and numbered cause, we desire to preface our reply thereto by the following general statement:

There does not appear anywhere in the respondents' brief nor in the record of this case, one single proposition on behalf of the said respondents which could appeal to the conscience of the Court. A bald and honest statement of the attitude of the respondents in this case is simply this: In 1907, as shown by the agreed state-

ment of facts in this case and exhibits thereto attached (Transcript 66 to 94, inclusive), prior to the admission of Oklahoma as a state of the Union and thirteen years before the filing of the suit in this case, William M. Patterson, the father and the duly appointed guardian of the other respondents in this case acting by and under the authority of the United States Courts of Indian Territory, sold the lands involved in this suit, to your petitioner, U. Sherman Joines.

The lands were appraised as required by the order of the Court, and the full value of said lands was paid by your petitioner, to the said respondents, therefor.

Your petitioner went into possession of the said lands in 1907 and remained in undisputed possession thereof until 1929, before this action was brought. There is not one single allegation of fraud in this whole case. There is no denial of the fact that your petitioner did purchase the said lands in good faith and for a fair consideration, and it is admitted that he paid the agreed consideration for the same.

William M. Patterson made no claim to any right, title or interest in or to said property at the time of the sale thereof to your petitioner, but represented to him, and in all of the court proceedings which appear in this record, that the property belonged to his minor children

for whom he was guardian. Insofar as William M. Patterson himself is concerned, he now comes into court, after thirteen years, and says, in effect: "Notwithstanding the fact that I sold this property to you as the property of my minor children and received the full value therefor, yet I deluded and deceived you, and, as a matter of fact I had at that time an outstanding life estate by curtesy in the same lands, and I now demand the possession during my life time of these lands which I sold to you."

The other respondents in this case, aside from William M. Patterson, do not come into court with any more justice or with any cleaner hands, than does the said William M. Patterson himself. They, too, admit that these lands were sold by their guardian in good faith, to the petitioner, U. Sherman Joines; that they received the full consideration therefor; but they now seek to recover back the lands in fee simple on certain legal technicalities, the sole basis for their claim growing out of the confusion incident to the change from the territorial form of government to the state form of government, and the admission of Oklahoma into the Union.

While seeking to recover this land from your petitioner, not one of the respondents in this case tenders or even suggests the repayment to your petitioner of the purchase price of these lands.

We mention this only to show that there is not one single element of right or justice in the claims of these respondents, as set forth in their own answer brief.

In defense of the claim of *William M. Patterson to a curtesy right*, an examination of the record in this case, and of the brief heretofore filed by us, will show that we have at all times alleged the following defenses:

(a) *That under the facts in this case and the law applicable thereto William M. Patterson did not take a curtesy estate in these lands.*

(b) *That under the agreed statement of facts in this case, if William M. Patterson was entitled to a curtesy estate, that his right thereto is barred by the Arkansas Statute of Limitations.*

(c) *That after having sold said lands to this petitioner, as the property of the other respondents in this case, William M. Patterson is estopped to set up and claim an outstanding life estate in himself.*

As to the other respondents in this case, aside from William M. Patterson, the record in this case will disclose that we have always set up the following contentions:

(a) *That the United States Court for the Southern District of Indian Territory had jurisdiction and power to order and direct the sale of the property involved in this suit.*

(b) *That with the formation of the State of Oklahoma the jurisdiction and power of the United States Court for the Southern District of Indian Territory was, by the procedure outlined in the Enabling Act and*

the Constitution of Oklahoma, transmitted to the County Court of Carter County, Oklahoma, and it inherited the power of the said Federal Court to complete said sale, by entering the order of confirmation.

(c) *That the entire proceeding is a collateral attack on the orders of courts of competent jurisdiction, and for that reason it cannot be maintained.*

(d) *That two of the adult heirs who had attained full age more than two years before the filing of this action, would be barred by the Statute of Limitations from maintaining the action, even though the court proceedings hereinafter referred to had not been sufficient to pass good title to this petitioner.*

With this summary before the Court, we will now briefly reply to some of the separate contentions set up in respondents' answer brief.

RESPONDENTS' FIRST PROPOSITION

Beginning at page 7 of their brief, respondents raise the question that inasmuch as the trial court found that William M. Patterson had an estate by curtesy in the lands in question, but resolved the issues against him on the ground that the Arkansas Statute of Limitations had run against such right, and also on the ground of estoppel, and your petitioner not having filed a cross appeal as to the finding of the trial court, that therefore the question as to whether or not under the facts in this case a curtesy estate actually existed, can-

not be considered by the Supreme Court of the United States on appeal.

We do not believe this contention to be well founded for a number of reasons, to which we direct the Court's attention.

Your petitioner having won the case in the lower court, had no occasion to appeal. The appeal to the Supreme Court of Oklahoma was prosecuted by the Pattersons, the respondents in this hearing.

We first direct the Court's attention to the petition in error, appearing at pages 1 and 2 of the Transcript, by reference to which it will be noted that the errors complained of are of such a character as to raise all of the issues that were presented to the lower court.

We next direct the Court's atention to the fact that most of the argument of the respondents in their brief is not applicable for the reason that it deals with cases where there was a *conflict of evidence* in the lower court and it was necessary for the trial court to weight the evidence and arrive at its conclusions of fact. *Such is not true, however, in the case which we are now considering. There was and is no question as to the facts.* The case was submitted to the trial court on an agreed statement of facts (Transcript 66 to 94, inclusive).

Ruling Case Law, Vol. 2, at page 208, lays down this rule:

> "Where there is no conflict in the evidence or the facts as specially found, the conclusion or judgment to be deduced therefrom is purely a question of law, to be finally determined by the reviewing court."

See also:

Jones v. *Glidewell*, 53 Ark. 161; 13 S. W. 723; 7 L. R. A. 831.

Mary J. Nolan, Administrix, v. *New York, New Haven & Hartford Railway Co.*, 70 Conn. 159; 39 Atl. 115; 43rd L. R. A. 305.

People v. *Reed, et al*, 81 Cal. 70; 22 Pac. 474; 15 A. S. R. 22.

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Tarbell v. Grand Trunk R. Co., 96 Vt. 170; 118 Atl. 484; 34 A. L. R. 1444.

Wenzell v. *Gregg*, 161 Wis. 413; 154 N. W. 645.

Ruling Case Law, Vol 2, at page 174, also lays down this further rule:

> "While an appellate court will not disturb the findings of fact made by the trial judge, unless they are manifestly against the weight of the testimony, this rule does not apply if he committed error of law in reaching his conclusions of fact, as where he made a mistake as to the onus probandi."

See also:

Lipe v. *Carolina R. Co.*, 123 S. C. 515; 116 S. E. 101; 30 A. L. R. 248.

Nicoletti v. *Los Banos Bank*, 190 Cal. 637; 214 Pac. 51; 27 A. L. R. 1479.

Boardman v. *Lorentzen*, 155 Wis. 566; 145 N. W. 750; 52 L. R. A. (N. S.) 476.

Under the foregoing authorities, we submit that the questions presented to the Supreme Court on the agreed statement of facts in this case, were purely questions of law, and the record shows that the Supreme Court of Oklahoma, without objection of either party, considered the whole case De Novo.

We now wish to direct the Court's attention to this further fact: *Both the parties to the suit and the Supreme Court of Oklahoma assumed that the question of the existence of a curtesy right in William M. Patterson was in issue in the appellate court*, and the case was argued time after time in that court, both in printed briefs and orally, on the assumption that the existence of such a curtesy right was in issue before the appellate court; and nowhere, either in their brief or in their oral arguments, nor at any time, did the respondents object to the consideration of this issue.

As a matter of fact, the issue was raised by William M. Patterson and the other respondents themselves, and

we respectfully submit that this matter having been considered in issue by the parties and by the Court, no party to the suit can at this late date be heard to complain.

Ruling Case Law, Vol 2, at page 184, lays down this rule:

> "After both parties have assumed that there was a certain issue, and the trial and judgment have proceeded on that assumption, neither can question the fact as to such issue on appeal."

See also the case of San Diego Land and Town Company v. Neale, 25 Pac. 977, where the court says:

> "Both parties assumed at the trial that there was an issue as to value, and the case proceeded to trial and judgment upon that assumption, and the defendants cannot now complain."

As we have already said, both of the parties to the present action treated the matter of the existence of a curtesy right in William M. Patterson under the facts in the case, as in issue, and we contend that the respondents cannot now, since the case has reached the Supreme Court of the United States, for the first time raise the contention that this matter is not an issue in the case.

As conclusive proof of our statement that this proposition has at all times been in issue, we here direct the Court's attention to the first opinion written by the

supreme Court of Oklahoma, appearing in the Transcript of the record, at page 105. In the body of this opinion, on pages 115 and 116, the Supreme Court of Oklahoma used this language:

> "In this action, W. M. Patterson, husband of the deceased allottee, claims a curtesy interest of life estate in the lands involved. In answer to Patterson's claim, it is sufficient to say that the allottee did not become seized of the possession, or the right of possession, to the lands in controversy during her life time. In the several states which have given effect to the curtesy right, among the prerequisite conditions to enjoy the right is the requirement that the wife should become seized of the title, or the right of possesion to the particular land during her life time. The allottee did not select her allotment during her life time. She had merely enjoyed the right during her life time to select some particular tract of land from the allotable lands, subject to the conditions and requirements of the allotment acts of Congress. The right of selection grew out of her citizenship status and community rights in the lands of the nation of which she was a member, and could not be more than an intangible or invisible property. Such property right could not be termed more than an incorporeal hereditament or chattel real. Priddy v. Thompson, 204 Fed. 955. The absence of seizin in the wife during her life time prevented the right of curtesy from attaching to the particular real estate in favor of her husband. Longest v. Langford, ...Okla..... ....Pac....."

It will therefore be seen that the Supreme Court of Oklahoma, in writing its first opinion in this case, specifically says that the matter was in issue before it.

We now direct the Court's attention to the fact that the respondents in this case themselves raised the issue again in the Supreme Court of Oklahoma, when they filed their petition for rehearing. This petition appears at page 116 of the record, and from the record at page 124, we take the following language:

> "The court reaches the conclusion that the surviving husband of Emma Patterson took no interest in the lands that were allotted to her after her death and that the said W. M. Patterson has no interest in the subject matter involved in this suit."

The respondents then proceed to submit that this holding was erroneous and they cite authorities in support of their contention, so that they have here again specifically raised the issue of the existence of this right, themselves.

Then, as further evidence of the fact that the Supreme Court of Oklahoma still considered this matter to be in issue, we direct the Court's attention to the final opinion appearing at page 132 of the Transcript. The first paragraph of the syllabus of the opinion there appearing, reads as follows:

> "The surviving husband of a deceased Choctaw Indian woman who was duly enrolled, but died before receiving her allotment, is entitled to curtesy in said lands under the facts stated in the opinion."

Finally, we refer the Court to the petition for rehearing filed by this petitioner in the Supreme Court of Oklahoma, which appears at page 143 of the Transcript, which document again shows that this question was still considered by the parties to be a vital one in the case. In other words, to sum up, the examination of this record will disclose that the question of whether or not William M. Patterson took an estate by curtesy, under the facts in the case, was considered to be in issue at every stage of the suit, that is, in the trial court and in the various hearings in the Supreme Court of the State of Oklahoma; that it is still in issue, and now before this Court. And never before, in any stage of the case or in any proceeding, until the filing of their brief in this Court, have the respondents attempted to take the attitude that this proposition could not be considered on appeal.

The Supreme Court of the State of Oklahoma having considered this matter on appeal and having reached the conclusion as shown by its opinion, that it has considered this issue, and that in arriving at its judgment it has construed the Federal Statutes and the laws of Arkansas having the force of Federal Statutes, we now respectfully direct the Court's attention to the long line of authorities cited by us at pages 50, 51 and 52 of our original brief filed in this Court, which, without excep-

tion, hold *that where the opinion of the state court shows upon its face that a Federal question was considered and passed upon adversely to the appealing party, that this is sufficient to confer jurisdiction upon the United States Supreme Court to pass upon the same issue.*

We therefore conclude that whether or not this particular proposition could have been raised and considered in the Supreme Court of Oklahoma, if William M. Patterson and the other respondents had objected to the consideration thereof when the issue was first presented, that they certainly come too late when they seek to raise the issue for the first time in this Court, after having themselves raised it and argued it throughout all of the past stages of the proceeding in the state courts, both trial and appellate.

RESPONDENTS' SECOND PROPOSITION

We now desire to consider briefly the matters alleged by the respondents in support of their second proposition, that is, in support of their contention that William M. Patterson, under the facts in this case, did take a curtesy estate in the lands of his deceased wife, Emma Patterson, filed by him as her administrator, in her name, after her death.

We first respectfully direct the Court's attention to the long line of authorities cited in our original brief heretofore filed in this cause, appearing at pages 57 to 74 of said brief. And in addition to said authorities, and as showing the nature of the interest of an allottee in tribal property before its actual selection and allotment to the individual, we desire to quote briefly from a number of decisions of this Court.

In the case of J. S. Mullen et al. v. United States, 224 U. S. 448, this Court held that lands allotted under identical facts with those in this case, were wholly unrestricted. It is not contended by the respondents in this case that these lands were restricted, and there is no question of restriction involved, and we merely cite this authority, without quoting.

In the case of Levi B. Gritts et al. v. Walter L. Fisher, 224 U. S. 640, in an opinion by Mr. Justice Van Devanter, the Court, in defining the nature of the interest of a member of the Cherokee tribe of Indians in the tribal property, uses this language:

> "During the last twenty years Congress has enacted a series of laws looking to the allotment and distribution of the lands and funds of the Five Civilized Tribes, of which the Cherokee tribe is one, among their respective members, and to the dissolution of the tribal governments. * * * * * * *Anterior to this legislation the lands and funds be-*

longed to the tribe as a community and not to the members severally or as tenants in common. The right of each individual to participate in the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise the right was at an end. It was not alienable or descendible."

This decision leaves no question as to the nature of the interest of Emma Patterson prior to her death. Under this holding she could not have been actually seized of an estate of inheritance, and not being so seized, her husband could not take a curtesy estate when he afterward selected and filed an allotment long after her death.

See also Alfred F. Goat v. United States, 224 U. S. 458.

We also wish to direct the Court's attention to the case of Wirt Franklin v. C. S. Lynch, 233 U. S. 269. The opinion in this case was written by Mr. Justice Lamar. We quote as follows: .

"The distinction between a member and an allottee is not verbal, but was made in recognition of a definite policy in reference to these lands. The Revised Statutes, Sec. 2118, declare that no conveyance from an Indian tribe shall be of any validity in law or in equity unless authorized by treaty. *As the tribe could not sell, neither could the individual members, for they had neither an undivided interest in the tribal land nor vendible interest in any particular tract.* * * * The act of 1904, re-

> lied on by plaintiff, removed some of the restrictions, and permitted those members of the tribe who were not of Indian blood to sell land after it had been actually allotted in severalty. *But it did not permit even a non-Indian to sell a mere float or expectancy.*"

We hold that the estate of Emma Patterson, or rather the right of Emma Patterson, was nothing more or less than a mere float or expectancy, and that therefore there could be no curtesy right in her husband because the elements of curtesy were not present. That is to say that there was never any actual seizin in her during her life time. Even the respondents, at page 17 of their brief, use this language:

> "It is true that under a strict application of common law rules to the conditions obtaining in the Five Civilized Tribes prior to statehood dower and curtesy would not attach for want of actual seizin or possesion in the lifetime."

This is a practical admission of our contention. The respondents have cited a number of cases by the Supreme Court of Oklahoma dealing with the wife's dower interest in the allotment of her husband, under circumstances similar to the facts in this case. We will not take the time to answer this argument for the reason that, as we have previously pointed out in our original brief, we hold that the same rule is not applicable to a dower interest that is applicable to a curtesy interest.

If Patterson takes a curtesy interest, he takes it by virtue of the provisions of Section 22 of the Choctaw-Chickasaw Supplemental Agreement, 32 Stat. 641, set out in full at page 59 of our original brief. This section says that the lands shall descend according to the provisions of Chapter 49 of Mansfield's Digest of the Laws of Arkansas. As we have previously pointed out, there is not one line about curtesy in that statute; but Section 2522, being the first section of said Chapter 49 of Mansfield's Digest, does say that when a person shall die having title to any real estate of inheritance, it shall descend to his kindred, male and female, subject to the widow's dower. It does not say that it shall descend subject to the husband's curtesy. Therefore, we say that the cases dealing with dower are not in point.

Section 20 of Mansfield's Digest of the Laws of Arkansas, deals with the subject of curtesy. But under Section 22 of the Choctaw-Chickasaw Supplemental Agreement, referred to supra, the descent is not made according to the laws of Arkansas generally, but according to the provisions of a single chapter, that is, Chapter 49 of said laws.

In conclusion of our argument of this proposition, while we understand that the case of Longest v. Langford, No. 11560, decided by the Supreme Court of Oklahoma July 24th, 1923, is either pending on rehearing or

on appeal to this Court, inasmuch as the Supreme Court of Oklahoma in its first opinion in the case now under consideration, at page 116 of the Transcript, specifically refers to this case, we think it well to quote from the original opinion of the Supreme Court of Oklahoma in that case, which opinion was written by the present Chief Justice of said court, Mr. Branson. We take the following extracts from the opinion in that case:

> "It will be noted that the said Mary E. Puckett was not the owner of the lands herein sued for at the time of her death, was not in possession of the same, and had no interest therein, and was not seized thereof at any time during her life. * * * * And that the said Mary E. Puckett had no interest therein of any kind or character during her coverture with the said G. N. Puckett and that the only interest that the said Mary E. Puckett had in any of the lands of the said tribes was by reason of her citizenship in the Choctaw Nation.
>
> "The essentials of an estate by the curtesy are (1) that the wife be seized of an estate of inheritance to which issue of the marriage may possibly succeed as heir to the wife; (2) that seizin in deed (less properly styled actual seizin) be obtained during coverture; (3) that issue be born alive; (4) the death of the spouse. The transpiring of these events constitute the contingency upon which an estate by the curtesy vests in the husband.
>
> "At common law, An estate by curtesy may exist in an estate of inheritance, and in no other estate." Where an enrolled citizen of the Choctaw Nation dies before any selection of an allotment

has been made for her, no estate of inheritance or other estate in the lands subsequently allotted ever vested in the allottee, and no estate by curtesy would arise in favor of the husband on the selection of an allotment in the name of the deceased wife.

"Record examined, and held, that G. N. Puckett, husband of Mary E. Puckett, an enrolled citizen of the Choctaw Nation, deceased, acquired no estate by curtesy in the land involved in this suit, and that his conveyance to the plaintiff, W. C. Langford, conveyed no interest therein, and that the judgment of the district court for possession of the premises sued for in favor of Lanford, based upon said conveyance, was erroneous, and it is reversed."

It will be seen from the reading of these extracts that there is an absolute conflict of opinion among the members of the Supreme Court of Oklahoma as to whether or not a curtesy interest does exist under the agreed facts in this case.

In the light of the long line of authorities which we have submitted, we respectfully submit that Patterson did not take a curtesy estate in the lands involved.

RESPONDENTS' THIRD PROPOSITION

The third proposition argued by the respondent appears at page 19 of their brief. It is listed there as proposition No. 2 though it is really their third proposition.

Under this proposition, they insist that the Arkansas Statute of Limitation did not operate to bar the curtesy estate of William M. Patterson in the lands of his wife, if in fact he took such an estate. In answer thereto, we respectfully direct the Court's attention to the long line of authorities cited by us in our original brief filed in this cause appearing at pages 74 to 86 inclusive of said brief.

We do not believe that the authorities cited by the respondents under this heading are in point or that they are an answer to the many cases cited by us in our original brief. We do think it necessary, however, to note briefly what we regard as a somewhat misleading statement appearing at page 21 of the brief. The respondents there say that while U. S. Joines may have gone into possession of the lands prior to November 16, 1907, he did not assert title therto except in pursuance of a guardianship sale. We respectfully submit that under the Arkansas Statute as construed by the Supreme Court of Arkansas many times before its extension in force in Indian Territory it does not make any difference under what kind of title Joines claimed, the mere fact that he was in open, adverse possession, claiming at all was sufficient.

Even the Supreme Court of Oklahoma itself has held many times in authorities which we have already cited

in our former brief that where the Arkansas Statute has once started to run that it was that Statute which continued to operate even after Statehood. That Court did not attempt to hold that this Federal Statute did not operate to bar the action if it ran at all but it did hold that the reason why it did not bar this particular action was because the deed under which Joines claimed was a void deed. We need not cite further authorities than those already cited in our original brief in answer to this holding. Indeed the numerous holdings of the Oklahoma Court itself which we have cited in our former brief are sufficient answer to this holding. What we particularly desire to call the Court's attention to here is the fact that the respondents say that your petitioner may have been in possession of the land prior to November 16, 1907. We say that there can be no question as to whether or not he was in possession of these lands prior to that date. The respondents' original petition appears in the Transcript at pages 5 to 7 inclusive. Paragraph 2 of their petition reads as follows:

> "That said defendant is in the possession of and has under his control the possession of said lands and premises hereinabove described, and has had the possession of said lands and premises at all times since the 5th day of July, 1907, and that said plaintiffs have been unlawfully denied the possession, the use and occupancy of said lands and premises since July 5th, 1907."

It will be noted that they specifically allege in their petition that said land has been in the possession and under the control of your petitioner at all times since the 5th day of July, 1907, and in paragraph 4 of their petition they seek to recover the rent value of said land during all of that period of time because of the unlawful with-holding of possession of said lands by your petitioner. This claim for rents, however, was abandoned by them and was not involved in the case.

We further direct the Court's attention to the agreed statement of facts appearnig in the Transcript at pages 66 to 94 and particularly to paragraph 12 of said agreed statement of facts appearing at pages 69 and 70 of the Transcript which paragraph reads as follows:

> "That the said U. S. Joines took possession of said lands and premises above described and has been in the peaceful possession of same from on or about the 5th day of October, 1907, until the present time, and is now in the possession of said lands."

It will be noted by reference to the foregoing paragraph that it is stipulated by all of the parties to the suit that your petitioner, U. S. Joines, has been in open possession of said lands at all times since the 5th day of October, 1907, and that he still is in possession of said lands. This eliminates any question of doubt as to

when he went into possession or how long he has been there.

In the argument of our 5th proposition in our original brief at pages 138 to 142 inclusive, we have pointed out a long line of decisions both by the Supreme Court of Oklahoma and by the Supreme Court of the United States holding that where the laws of one State are adopted and extended in force in another State that the construction placed upon that law by the highest court of the State from which the Statute is adopted is taken and adopted along with the Statute itself.

We have also pointed out in that brief the fact that this Arkansas Statute of Limitations was many times construed by the highest court of Arkansas before its adoption and that open, adverse possession under said Statute is alone sufficient to create title in him who holds possession. We have also cited in our former brief a line of Oklahoma authorities, all of which hold that where the Arkansas Statute started to run prior to Statehood that it continued to run until it barred the action and we have now here pointed out to the Court the paragraphs of the respondents on petitions filed in the lower court and the paragraph of the agreed statement of facts upon which the case was tried which show that your petitioner went into possession of said lands

not later than October 5, 1907, and has been in possession ever since.

The action was filed in 1920. He had been in open, undisputed possession for thirteen years, nearly twice the period of the Arkansas seven-year Statute. The Court will take judicial notice of the fact that Oklahoma became a State on November 16, 1907, and there can then be no question of doubt but that the Arkansas Statute was running when the State was admitted.

Ruling Case Law, Volume 17, page 748, Section 116, lays down the following rule as to when the Statute of Limitation begins to run. It uses this language:

> "The general rule is that the Statute of Limitations begins to run as soon as the right of action has accrued and not until then * * * * * It may be stated as a second general proposition that a cause of action accrues the moment the right to commence the action comes into existence and, conversely, the right to commence the action arises the moment the cause of action accrues. Whenever it is in the power of a person to enforce his demands, his cause of action has accrued * * * * * * The test in each case is in the absence of some Statute to the contrary, whether the party asserting the claim is entitled to maintain an action to enforce it."

Under the foregoing rule, we assert that when Joines went into possession of this land in either July or October, 1907, William M. Patterson's right of action, if he had one, accrued. He did not bring it until thir-

teen years later. We have here no question of a State by legislation attempting to change the applicable Statute because the Oklahoma Supreme Court, in the several decisions which we have cited, has already held that the Arkansas Statute is the one which would operate if it ever started to run. The question which is presented to the Court at this time is that of construing a Federal Statute which was in force in Indian Territory and of determining when under the agreed statement of facts that Statute started to run and whether or not, under the agreed facts, that Statute now operates as a bar to William M. Patterson's right of action. In other words, our rights here are based wholly on the question of the construction of a Federal Statute in Indian Territory. That is, insofar as the question of limitation is concerned.

It seems to us that nothing remains to be said on this proposition. If Patterson ever took an estate by curtesy, it is barred by the Arkansas Statute of Limitation.

RESPONDENTS' FOURTH PROPOSITION

The fourth proposition argued by the respondents begins at page 23 of their brief and it is there numbered "Proposition Number Three."

This proposition deals with the right of the United States Court for the Southern District of Indian Ter-

ritory to order and conduct the guardianship sale under which your petitioner, U. S. Joines, acquired the lands involved in this suit and with the further question as to what Court inherited the jurisdiction to confirm the sale so ordered and conducted by the said United States Court, such confirmation being had after the admission of the State of Oklahoma into the Union.

We have already discussed this proposition at great length under our Proposition Three and the various sub-divisions thereof, this discussion appearing in our original brief at pages 87 to 129 inclusive, and we here refer to and adopt the arguments there made.

The respondents' argument is somewhat difficult to understand. It seems based on the following general principals, however. First, that the proceeding for the sale of these lands in the United States Court for the Southern District of Indian Territory, prior to Statehood, was only an ancillary proceeding and that the main guardianship proceeding was pending at Durant in the Central District of Indian Territory and that therefore the County Court of Bryan County instead of the County Court of Carter County would inherit the jurisdiction to confirm this sale. They also devote considerable space to the argument of this proposition on the theory that we claim a vested right in a matter of

procedure and that there can be no vested right in procedure.

We here take the liberty of again directing the Court's attention to the Arkansas Statute under which this sale was had, which is set out in full in our original brief. We also direct the Court's attention to the construction of that Statute by the Supreme Court of Arkansas in the case of Reid et al v. Hart, which case has been cited and from which we have quoted at length in our original breif.

We also direct the Court's attention to the Federal Statutes there cited extending said Arkansas laws in force in Indian Territory. Reference to these citations disclose that the Statute itself confers authority on the Probate Court of the County *in which the lands are situated* alone, to order and direct the sale of guardianship property, this apparently to the exclusion of any jurisdiction in the Probate Court of the County in which the guardian may have been appointed if the lands were located in a different county.

An investigation of the authorities there cited will also disclose that in the case of Reid et al v. Hart, the *Supreme Court of Arkansas held that the Probate Court of the County in which the lands were situated had jurisdiction to order the sale of the lands.* There

is absolutely nothing either in the Statute or in that decision of the Arkansas Court which holds that this is merely an ancillary proceeding. It is a complete proceeding for the sale of the property within itself.

An investigation of the Congressional enactments referred to discloses that in extending these Arkansas laws in force in Indian Territory, Congress provided that the judicial districts of Indian Territory should correspond with the Arkansas County sub-divisions in applying this law . In the case at bar, pursuant to said Congressional enactments and the laws of Arkansas hereinbefore referred to, the guardian went into the United States District Court where *the lands were situated* and there conducted his proceedings for the sale of this property down to the point of the entry of the order of confirmation. Every other requisite of the proceeding had been fully carried out. The consideration had been paid over and the deed had been executed and there was on file in the United States Court a petition for the confirmation of this sale, but before the Federal Court could enter the order of confirmation, Statehood intervened.

It is agreed in the 10th paragraph of the agreed statement of facts at page 69 that the papers concerning the sale of the lands in question were on file in the United States Court for the Southern District of Indian

Territory and that they were transmitted with the coming of Statehood to the County Court of Carter County, Oklahoma. There is nothing in the record and no contention made any where that they were ever on file in the United States Court for the Central District of Indian Territory, or in the successor of that court, the County Court of Bryan County, Oklahoma.

The respondents in their breif, at pages 24 and 25 admit that the proceedings concerning the sale of this property were on file in the United States Court for the Southern District of Indian Territory and that they were transmitted to the County Court of Carter County. They say in effect:

> "No Probate proceeding was pending in the Southern District at Ardmore other than proceeding in which this guardian had sought to sell lands located within the confines of the Southern District."

Now, we contend that this was not an ancillary proceeding but that a proceeding for the sale of property under the Arkansas Statute was a complete proceeding within itself. Had the United States Court for the Southern District entered its order of confirmation before Oklahoma was admitted into the Union, the proceeding would have been complete and the jurisdiction of that Court would have been exhausted; but it did not do this and, under the procedure pointed out by the en-

abling act and the constitution, the power to confirm this sale was transmitted through the District Court of Carter County to the County Court of Carter County and it inherited the power to complete that sale which had previously been vested in its predecessor, the United States Court for the Southern District of Indian Territory.

When the County Court of Carter County entered its order confirming this sale, it exhausted its jurisdiction and we are not confronted with the proposition of two Probate Courts in Indian Territory having an equal general jurisdiction over the entire Patterson guardianship proceeding. We simply have a situation where, under the arbitrary procedure established to transfer pending causes from the Territorial Courts to the State Courts, the branch of this proceeding which was pending in the Territorial Court of the Southern District was transferred to the County Court of Carter County with jurisdiction to complete the work of its predecessor while the proceedings having to do solely with the appointment of the gardian which were on file in the Central District of Indian Territory were by the same procedure arbitrarily transferred to the County Court of Bryan County.

We have already cited and quoted at length in our original brief most of the applicable statutes and de-

cisions but we desire here to refer to a few other statutory provisions which will throw light on this subject.

The first section of the Enabling Act under which Oklahoma was admitted into the Union (34th Statute, 267) says:

> "The inhabitants of all of that part of the area of the United States now constituting the territory of Oklahoma and the Indian Territory as at present described, may adopt a constitution and become the State of Oklahoma *as hereinafter provided.*"

The Enabling Act then goes on and lays down the terms and conditions on which the State may come into the Union. Among the other provisions of the Enabling Act are Sections 19 and 20, the applicable portions of which we have already copied in full in our original brief.

Section 22 of said Enabling Act reads as follows:

> "That the constitutional convention provided for herein shall by ordinance irrevocably accept the terms and conditions of this act."

By Section 28 of the Schedule to the Constitution of Oklahoma, the aforesaid provisions of the Enabling Act with reference to the transfer of pending causes were specifically accepted.

We now take the liberty of quoting at length Section

27 of the Schedule to the Constitution of Oklahoma. This section reads as follows:

> "All cases, civil and criminal, pending, at the time of the admission of the State into the Union, in the District Courts of the Territory of Oklahoma, in any county within the district, and the records, papers, and proceedings of said District Court, and the seal and other property appertaining thereto, shall be transferred into the District Court of the State for such county, except as is provided in the Enabling Act of Congress, and all cases, civil and criminal, pending, at the time of the admission of the State into the Union, in the United States Court for the Indian Territory, within the limits of any county, created in whole or in part within the limits of what was heretofore the Indian Territory, and all records, papers, and proceedings of said United States Courts for the Indian Territory, and the seal and other property appertaining thereto, shall be transferred to the district Court of the State for such county, except as is provided in the Enabling Act of Congress and the amendments thereto: Provided, That the Legislature may provide for the transfer of any such cases from one county to another county. (Bunn's Ed. Sec. 476.)

We have already quoted at length in our original brief Section 23 of the Schedule to the Constitution and also Section One and the Preamble to the Constitution and to these quotations we again refer.

The provisions of the Enabling Act and the Sections of the Schedule to the Constitution which we have here pointed out provide the complete procedure for the

transfer of causes pending in the Territorial Courts at the time of the admission of Oklahoma as a State on November 16, 1907, and we respectfully submit that there was absolutely no option in either the State or Federal Court as to where and how these pending causes should be transferred.

We have cited in our original brief authorities from the Supreme Court of Oklahoma holding that the procedure was arbitrary and that it left no discretion whatever in the Courts but merely made of them the instrumentalities to transmit the jurisdiction in the manner and to the places provide by said acts.

The constitution and the Enabling Act must be construed together as the one is the acceptance of the terms of the other and the two together establish the complete procedure.

There is no occasion for us to answer the portion of the brief of the respondents which charges that we are claiming a vested right in procedure for the reason that there was no change in the procedure here established. Sections 23 and 27 quoted supra contain the provisions that the legislature may provide for the transfer of any such cases from one County to another County. This is only a recognition of the fact that under this procedure, arbitrarily established by the constitution and the

Enabling Act, causes would be transferred to Counties which did not have jurisdiction if the proceeding were a new proceeding brought after Statehood and, as we have already pointed out in our original brief at pages 111 to 114 inclusive, the Legislature of Oklahoma in 1908 (Session Laws 1908, page 212) did enact a law which provided in effect that where by the procedure established by the constitution and the Enabling Act, a cause was transferred to a County which would not have had jurisdiction had the proceeding been instituted after Statehood that such pending proceeding might *on application of some interested party* be transferred to the Court which would have had jurisdiction had the proceeding been brought after Statehood, but as we have already pointed out in the aforesaid pages of our original brief, the Supreme Court of Oklahoma in the case of Eaves v. Mullen there cited, has held that that act was not self-executing; that it did not provide for the transfer of such causes *except where some interested party made application for such transfer.*

No such application was made in this proceeding for the sale of the lands involved in this case. It is true that because of the confusion incident to the creation of a new State and the transfer of thousands of pending causes, that this particular sale was not confirmed for some four or five years after the transfer of the

records in the case from the United States Court for the Southern District of Indian Territory to the County Court of Carter County, but no interested party had in the interim applied for a transfer of this cause to Bryan County or any other County and therefore the inherited jurisdiction which the County Court of Carter County inherited from the United States Court for the Southern District of Indian Territory to complete this pending proceeding by the entry of the order of confirmation, remained in that Court and was exercised by it when it entered its order of confirmation on the 5th day of August, 1913.

Among other things, the County Court of Carter County at the time of entering the order of confirmation and as a part of said order, finds that all of the proceedings for the sale of the property were duly, legally and regularly had and conducted and it further finds in said order at page 91 of the Transcript that the County Court of Carter County, State of Oklahoma, is the successor of the United States Court for the Southern District of the Indian Territory, sitting at Ardmore, and as such, is authorized to do any and all things herein which the said United States Court for the Southern District of the Indian Territory, sitting at Ardmore, could have done, and that its order of confirmation is entered pursuant to such inherited jurisdic-

tion. The exact language of the Court in this behalf is as follows:

> "And, whereas, the County Court of Carter County, State of Oklahoma, being the successors of the United States Court for the Southern District of the Indian Territory, sitting at Ardmore, and being authorized to do any and all things herein which the said United States Court for the Southern District of the Indian Territory sitting at Ardmore could have done, did on the 14th day of July, 1913, make an order confirming said sale."

The rights of your petitioner here depend absolutely on the construction of Federal Statutes and the rights claimed under Federal Statutes. The questions to be answered are these:

"Under the Federal Statutes cited and the laws of Arkansas extended in force in Indian Territory and having the force of Federal Statutes, did the United States Court for the Southern District of Indian Territory have power to order this sale? Secondly, under the procedure established by the provisions of the Enabling Act, and the Constitution accepting the Enabling Act, did the County Court of Carter County inherit the jurisdiction of the United States Court for the Southern District of Indian Territory to confirm the sale?"

We think that both of these questions must be answered in the affirmative and that the title of U. S. Joines, your petitioner, must be upheld.

RESPONDENTS' FIFTH PROPOSITION

The fifth proposition argued by the respondents, appears at page 30 of their brief, under the caption, "Validity of Sale Without Confirmation."

We have always felt that one of the outstanding errors committed by the Supreme Court of Oklahoma, was in holding that this sale made under the Arkansas Statute in force in Indian Territory having the force of a Congressional enactment, must have been confirmed within one year from the date of the sale. It appears to us that the reasoning of the Oklahoma Supreme Court here is absolutely without foundation. It holds, in effect, that this sale had under this Arkansas Statute, must have been confirmed within a year from the date of said order of sale, because there is an Oklahoma statutory provision which was enacted in 1908 which says that no order of sale shall continue in effect for more than one year *without a sale being had thereunder.*

This Oklahoma Statute has absolutely nothing to do with the matter, for a number of reasons. In the first place, as we have pointed out in our original brief, beginning at page 122, the holding of the Oklahoma Supreme Court is erroneous for the reason that the *sale was not had under said Oklahoma Statute.*

In the second place, it is erroneous because the exhibits attached and made part of the agreed statement of facts, conclusively *show that the sale was had within a year from the date of the order of sale.*

In the third place, even if the Oklahoma Statute applied, which it does not, said act does not require that the sale be confirmed within a year. *It merely requires that a sale be had within a year*, and there is no fixed time even under the Oklahoma law within which it must be confirmed. So that, for these three reasons, the judgment of the Supreme Court of Oklahoma is undoubtedly erroneous.

Furthermore, as will be seen by reference to our original brief, we have cited a long line of authorities at pages 125 to 129, all of which hold that the *sale does not take the date of confirmation*, but that the *order of confirmation when entered relates back and the sale becomes effective and binding and passes title as of the actual date of the sale itself.*

In addition to what we have there said, we desire to quote from the case of Brasch v. Munsey, 99 Ark. 324, 138 S. W. 458, for the reason that this is an opinion of the Arkansas Supreme Court and sets forth the holdings of that court on the subject of the confirmation of

judicial sales. We take the following extract from the opinion in that case:

> "The effect of the confirmation of a judicial sale is, however, primarily to determine that such sale has been made in due compliance with the provisions of the decree; and where such sale is made fairly and honestly, and in due compliance with the provisions of the decree, the purchaser has a right to insist upon its due confirmation. When a confirmation of sale is made, all objections thereto are concluded, and the bargain becomes complete *and the rights springing therefrom relate back to the date of the sale which was made by the commissioner. After the commissioner's sale is confirmed, the rights of the purchaser relates back to the date of the sale made by him and the purchaser is then considered the owner from and after that date.* Rorer on Judicial Sales, Sec. 122; 17 Am. & Eng. Enc. Law, 993; Green v. Robertson, 80 Ark. 1, 96 S. W. 138; Haralson v. George, 56 Ala. 295; Cale v. Shaw, 33 W. Va. 299, 10 S. E. 637. *It follows from this, therefore, that after a judicial sale has been duly confirmed it dates, not from the confirmation thereof, but from the time of the sale made by the commissioner under the order of the court.*"

The question of confirmation of this sale presents a clear cut Federal question. It involves the construction of a Federal Statute in force in Indian Territory prior to Statehood. A sale had been had under that particular statute. Everything had been done except the entry of the order of confirmation. By virtue of the fact that the petitioner in this case had bid in the property, had paid over the consideration; that the consideration had

been accepted by the Pattersons and that they had filed their petition in the Federal Court asking for the confirmation of this sale, vested rights had been acquired by your petitioner, that is, he had a right to have the sale confirmed, and Congress guaranteed him that right when it passed the Enabling Act and compelled the new state by its constitutional provisions to continue this pending proceeding to conclusion, *as though no change in government had taken place.*

We respectfully submit, therefore, that when the County Court of Carter County, Oklahoma, entered its order confirming this sale on the 14th day of July, 1913, that the order related back and made the sale effective and caused the title to pass as of the actual date of the sale itself, which, as shown by the report of sale made by William M. Patterson, and appearing at page 78 of the Transcript, was on the 5th day of July, 1907.

RESPONDENTS' SIXTH PROPOSITION

This proposition appears at page 33 of the respondents' brief, under the caption, "Plaintiff in Error's Proposition No. 4." It is, in effect, that the statute of limitations did not run as against Dorothy McFarland nee Patterson and Shelby A. Patterson, two of the respondents who became of age more than two years prior

to the filing of this action, and the only ground urged is that there was an outstanding life estate in their father, William M. Patterson, which prevented the running of this statute. That was in effect what the Supreme Court of Oklahoma held.

We have already argued this phase of the case under Proposition Number Four in our original brief, and have there referred to the authorities cited by us in other portions of the brief, first, to show that Patterson never took an estate by curtesy, and secondly, that if he did take an estate by curtesy, the Arkansas Statute of Limitations created title in the petitioner, which had the effect of completely destroying and wiping out any life estate of the said William M. Patterson; and that therefore these two adult respondents, if they had any right of action, would be barred from asserting it by reason of their failure to file their action within the two years next after attaining majority.

COLLATERAL ATTACK

In conclusion of our original brief, at page 145, we pointed out the fact that we had raised the issue that this whole proceeding on the part of the respondents is a collateral attack on the orders and judgments of courts of competent jurisdiction, and for that reason the action could not be maintained.

We direct the Court's attention to next to the last paragraph of your petitioner's answer, appearing at page 42 of the Transcript, where this issue is raised.

In the case of Steel v. Kelley, 32 Okla. 547, 122 Pac. 934, the Supreme Court of Oklahoma uses this language:

> "The United States Courts in the Indian Territory were courts of superior jurisdiction; all presumptions were in favor of their action; and all irregularities in the exercise of their jurisdiction in probate proceedings, rightfully acquired, were cured by final judgments, and not open to collateral attack."

In the case of Vinson v. Cook, 76 Okla. 46, 184 Pac. 97, the Supreme Court of Oklahoma uses this language:

> "The County Courts of this state are courts of record and have general jurisdiction in probate matters. The orders and judgments of such courts, when acting within their jurisdiction, are entitled to the same favorable presumption and to the same immunity from collateral attack as are accorded to those of other courts of general jurisdiction."

See also Welch v. Focht, 171 Pac. 739.

In the case of Southwestern Insurance Company v. Taylor, et al, 173 Pac. 831, the Supreme Court of Oklahoma holds as follows:

> "An order of the County Court transferring a guardianship cause to the County Court of another county in this state cannot be collaterally attacked, and it is to be presumed that the court be-

> fore making the order of transfer performed his duty and found the facts to justify the order to be true."

Ruling Case Law, Vol. 16 at page 83, lays down the rule that an order of a probate court confirming a sale, is a final judgment.

In the case of Welch v. Focht, quoted supra, the Supreme Court of Oklahoma says:

> "In a collateral attack on a guardian's deed and the sale proceedings of a County Court, the scope of inquiry is confined to the question as to whether the County Court had jurisdiction of such proceedings."

Without citing further authorities, we respectfully submit that unless this court shall find that the United States Court for the Southern District of Indian Territory was absolutely without jurisdiction to order the sale of the lands in this case, and unless it shall find that the County Court of Carter County, Oklahoma, was absolutely without jurisdiction to confirm the said sale, that then the whole proceeding is a collateral attack on the orders of the United States Court for the Southern District of Indian Territory, and the Probate Court of Carter County, Oklahoma, and that for this further reason, it must fail.

ESTOPPEL

The first paragraph of the Syllabus of the case of Atlantic Coast Line Railway Company, Appt. v. Radaughton, Commissioner, et al, 262 U. S. 415; 67 Ed. 1051, reads as follows:

> "In cases properly before the Supreme Court of the United States on Federal questions, all questions presented by the record, whether involving Federal or state law, must be considered."

If, in line with the rule laid down above, this Court shall hold that in the consideration of the case now at bar it will consider also the question of estoppel on behalf of your petitioner in this cause, we then desire to direct the Court's attention to the following matters which appear in the record:

At page 41 of the record, in defendant's answer, appears the following paragraph:

> "Further answering, and by way of estopped, this defendant specially pleads that the plaintiff, Wm. M. Patterson, held himself out, as guardian, of the two said minor children aforesaid, and represented to this plaintiff that the said children were the sole heirs of the said Emma Patterson, deceased, and had all the right, title and interest in her said lands; and that by reason thereof, he is now estopped from setting upon and claiming any interest in or to the same."

As part of the agreed statement of facts, at page 71

of the record, appears William M. Patterson's petition, as guardian, to sell the lands involved in this suit. We take the following extract from this petition:

> "Petitioner states that said minors are the children of William M. Patterson by his wife, Emma Patterson, born to them in lawful wedlock, and that they are the only children of the said parents, *by the said or any other marriage and that they are the only heirs of the said Emma Patterson, whatsoever.*"

At page 74 of the record, we take the following extract from the recommendation of the United States Court Clerk to the United States District Judge of the Southern District recommending the sale of the property involved in this action:

> "It appearing that within named minors are seized of lands herein in fee simple from their deceased mother, *the father not claiming any right or title thereto,* and that it to the best interest of said minors that said lands be sold to provide for their education and support and to improve their separate estates, so as to make them productive and revenue producing, I respectfully recommend to the court that the petition be granted."

At page 75 of the record, we take the following extract from the Court's order directing the sale of this property:

> "And it appearing to the court that the said William M. Patterson is the legal guardian of said minors; that they are the owners of the lands hereinafter mentioned and set forth, having inherited

the same from their mother, Emma Patterson, deceased."

From pages 80 of the record, we take the following extracts, from the guardian's report of sale:

"The bid so made for same by said U. S. Joines, and so accepted by your petitioner, was, in the opinion of your petitioner, equal to the full value of the interests of said minors in said lands and premises; *That is, to the value of the fee simple title thereof, free and unincumbered in anywise whatever.*

Your petitioner further states that he endeavored in all proper and legitimate ways, to cause the said lands and tenements to sell for the highest price possible; and that he neither omitted, neglected or left undone anythnig he could do to further the interests of his said wards in said sale; *that the lands, having brought their full value, your petitioner suggests that the said sale should be approved and confirmed, and he so asks.*"

We also refer to the two deeds executed by the said William M. Patterson, guardian, in favor of U. S. Joines, appearing at pages 84 and 88 respectively of said record.

In the face of these representations on the part of the said William M. Patterson as to the ownership of the property in question, we respectfully submit that he is estopped to set up and claim any interest in this property as against your petitioner to whom he sold and conveyed the property as the property of his minor

children for whom he was then and there legal guardian.

We do not deem it necessary to cite many authorities in support of this contention but direct the Court's attention to Folk v. United States, 233 Fed. 177, where it is said:

> "In equity, no one may successfully deny to the damage of another the truth of his statements or representations by which he has purposely or carelessly induced another to so change his situation that the assertion of the truth will irreparably or seriously injure him."

See also the case of Revel v. Pruitt, 42 Okla. 696; 142 Pac. 1019, where the Court said:

> "Where a party brings suit as next friend for a minor son for damages for decreased earning power, he is estopped from subsequently recovering such damages for his own use."

Certainly the rule laid down in this last mentioned case would apply with equal force to a guardian who sold property as the property of his wards and later undertook to recover it from his grantee as his own property.

CONCLUSION

In conclusion, therefore, for the reason stated in our original brief and in this reply brief, we respectfully

submit that the judgment of the Supreme Court of the State of Oklahoma rendered in this cause, is erroneous, and that said cause should be reversed and judgment rendered herein for your petitioner.

WM. G. DAVISSON,

Attorney for Petitioner.